COURT OF APPEALS
DECISION
DATED AND FILED

May 3, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP565-CR **Cir. Ct. No. 2013CF615**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

IVAN BOYD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: TIMOTHY M. WITKOWIAK, Judge. *Affirmed*.

Before Lundsten, P.J., Sherman and Kloppenburg, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Ivan Boyd appeals a judgment of conviction for armed robbery as a party to a crime, and an order denying his motion for

postconviction relief. Boyd contends that he is entitled to a new trial based on newly discovered evidence and ineffective assistance of counsel. For the reasons discussed below, we affirm.

BACKGROUND

¶2 Boyd was charged with armed robbery as a party to a crime. At trial the victim, T.P., testified that on January 28, 2013, she received a telephone call from an individual who identified himself as "Bobby Smith," who said he wished to view an apartment owned by her employer. T.P. testified that on the morning of January 29, she met the individual identified as "Bobby Smith" outside the apartment building. T.P. identified Boyd as the man known to her as "Bobby Smith."

¶3 T.P. testified that after they entered the apartment, Boyd told her that he had a gun in his pocket and that "if [T.P. did not] do whatever [Boyd] says that he will kill [T.P.] dead right on that floor." T.P. testified that Boyd told her that he needed $20,000 and that Boyd drove T.P.'s car to an ATM where he demanded that T.P. withdraw money from her bank account. T.P. testified that she withdrew as much money from her account as she was able to and gave the money to Boyd. T.P. testified that the amount of money she withdrew was less than what Boyd had demanded and that Boyd told her that "he still needed more money." T.P. testified that they drove to another location where they picked up a woman who T.P. later identified as Shonda Martin, and that Boyd told her that Martin also had a gun. T.P. testified that they drove to a bank on West Appleton Avenue in Milwaukee and that Boyd told her that she and Martin were to go inside the bank and withdraw money from T.P.'s bank account. T.P. testified that while Boyd waited

inside her vehicle, she and Martin went inside the bank where T.P. withdrew $8,000 in cash from her account, which she gave to Martin.

¶4 T.P. testified she and Martin returned to the vehicle and Boyd drove around for approximately fifteen to twenty minutes before coming to a stop on a side street. Boyd wiped down the inside and outside of the car, and then took off on foot. T.P. testified that Martin was still in the vehicle and that after Boyd left, T.P. drove the vehicle to another street where Martin got out. T.P. testified that after Martin exited the vehicle, she called her husband and then the police.

¶5 Milwaukee police officer Charles Leach testified that he examined T.P.'s phone log for calls received on January 29, 2013. One of the calls received on T.P.'s telephone was from a number connected to Boyd. Officer Leach also testified he presented T.P. with a photo array, which included a photograph of Boyd. Officer Leach testified that T.P. identified Boyd as the man who robbed her.

¶6 The jury found Boyd guilty. Boyd filed a motion for postconviction relief. Boyd asserted that he is entitled to a new trial on the basis of newly discovered evidence in the form of: (1) an affidavit of Caroline Criss in which Caroline averred that Boyd was with her all day on January 29, 2013; (2) an affidavit of Martin in which Martin averred that she had committed the robbery with Boyd's son, Ivan Boyd, Jr., not Boyd; (3) a letter to Boyd from Boyd, Jr. in which Boyd, Jr. apologized for Boyd being "locked down for some stupid shit I did…"; and (4) an affidavit by Dimitri Criss in which Dimitri averred that he observed Boyd lend his cell phone to Boyd, Jr. in January or February 2013. Boyd also asserted that he is entitled to a new trial on the basis of ineffective assistance of counsel. Boyd argued that his trial counsel was ineffective for: (1) allowing a

plea deal from the State to lapse; (2) for failing to object to the admissibility of a photo array; and (3) failing to investigate Boyd's alibi witness, Caroline Criss.

¶7 The circuit court denied Boyd's motion without an evidentiary hearing. Boyd appeals. We set forth additional facts in our discussion below.

DISCUSSION

¶8 Boyd contends that the circuit court erred in denying his postconviction motion for a new trial based on newly discovered evidence and ineffective assistance of counsel without first holding an evidentiary hearing.

¶9 In a postconviction motion, a defendant must allege sufficient material facts that, if true, would entitle the defendant to relief. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. If the defendant does so, the circuit court must hold an evidentiary hearing on the defendant's motion. ***Id.*** However, if the "motion does not raise facts sufficient to entitle the [defendant] to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to … deny the motion without a hearing" or to grant an evidentiary hearing despite the deficient motion. ***Id.*** Boyd's postconviction motion was denied without an evidentiary hearing. Accordingly, the issue before us is whether Boyd alleged sufficient facts in his postconviction motion that if true, would entitle Boyd to relief, and thus a hearing. ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). We review de novo whether a defendant's motion alleged sufficient facts that, if true, entitled the defendant to a hearing. ***State v. Avery***, 2013 WI 13, ¶22, 345 Wis. 2d 407, 826 N.W.2d 60 (newly discovered evidence); and ***State v. Bentley***, 195 Wis. 2d 580, 585, 536 N.W.2d 202 (Ct. App. 1995) (ineffective assistance of counsel).

A. Newly Discovered Evidence

¶10 To set aside a judgment of conviction based on newly discovered evidence, "the defendant must prove, by clear and convincing evidence, that '(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative.'" ***Avery***, 345 Wis. 2d 407, ¶25 (quoted source omitted). If the defendant satisfies his or her burden on all four of these elements, the circuit court must then determine whether there is a reasonable probability that a jury, looking at both the old and new evidence, would have a reasonable doubt as to the defendant's guilt. ***Id.***; s*ee also* ***State v. Brunton***, 203 Wis. 2d 195, 200, 552 N.W.2d 452 (Ct. App. 1996) (defendant must show that evidence claimed as newly discovered evidence meets each of these five criteria).

¶11 Boyd alleged in his postconviction motion that four pieces of newly discovered evidence entitled him to a new trial: (1) an affidavit by Caroline Criss in which Caroline averred that Boyd was with her all day on January 29, 2013; (2) an affidavit by Martin that she had committed the robbery with Boyd's son, Ivan Boyd, Jr., and not Boyd; (3) a letter to Boyd from Boyd, Jr.; and (4) an affidavit by Dimitri Criss in which Dimitri averred that he observed Boyd lend his cell phone to Boyd, Jr. in January or February 2013. We address each piece of evidence in turn below.

1. Caroline Criss Affidavit

¶12 Caroline, Boyd's sister, states in her affidavit:

> On the morning of January 29th, 2013, between the time of 9 o'clock AM and 9:30 AM, I specifically recall my brother, Ivan Boyd, arriving at my home …. Ivan remained

> at my home the entire day until leaving for home at 7 o'clock PM.
>
> I am confident in my recollection concerning Ivan's whereabouts and events on January 29th, 2013, because it was no different than any other day. During the months of Nov[ember], Dec[ember], and Jan[uary], of 2013, as routine, every morning Ivan would come over to my place, where we would have breakfast and coffee. The rest of the day we would simply enjoy each other's company; catching up on los[t] time from when Ivan was incarcerated. Every night at 7 o'clock sharp, Ivan would leave my house in order to make it back on the other side of town where he lived with our mother, in time for his 8 o'clock curfew.

¶13 In his motion and reply brief for postconviction relief, Boyd states that he "informed his attorney of Caroline Criss," that his trial attorney "fail[ed]" to bring Caroline to the circuit court's attention, and that his "alibi witness was mentioned on the record."

¶14 Alibi testimony generally does not qualify as newly discovered evidence because it relates to "matters which must have been within the knowledge of the defendant at the time of the original trial." ***McGeever v. State***, 239 Wis. 87, 97, 300 N.W. 485 (1941). Here, Boyd would have known prior to trial that he had been at Caroline's house from morning until early evening on January 29, 2013, and Boyd acknowledges in his motion that his trial counsel was aware of Caroline. Accordingly, we conclude that Boyd has failed to set forth facts showing that the alibi evidence came to his knowledge *after* the trial and therefore affirm the circuit court as to this evidence.

2. Martin's Affidavit

¶15 Martin states in her affidavit:

> Ivan Boyd, born July 8th, 1980, is not the individual who I accompanied to the [bank], along with [T.P.], on

> January 29th, 2013, but rather, it was [Ivan Jr.], born August 2, 1996. This is the son of [Boyd], born July 8th, 1980. This has been a horrible case of mistaken identity ever since the very beginning.
>
> During my police interrogation that took place on February 11th, 2013, I eventually admitted that Ivan Boyd did in fact participate in this incident, but apparently, the police must have assumed I was referring to Ivan Boyd the father, when that assumption could not have been any further from the truth.

¶16 In his postconviction motion, Boyd states that a photo attached to his motion shows that he and Ivan Jr. have "facial features, weight, and height [that] are strikingly similar." Boyd further states that he was unaware that Ivan Jr. "was the person who participated in this crime," that he "believed [T.P.] was lying about the incident," and that Martin's clarification as to which Boyd committed the crime did not come to his knowledge until after trial when Martin made her affidavit.

¶17 As argued by the State, Boyd was aware prior to his conviction that Martin had named "Ivan Boyd" as the individual with whom she committed the robbery on January 29, 2013. At that time, Boyd would have known one of two things: (1) Martin was lying that "Ivan Boyd" had committed the crime with her; or (2) the crime was committed by a different "Ivan Boyd." Because both alternatives were known to Boyd before trial and could have been investigated before trial, the second alternative, which was asserted in Martin's affidavit, was not new.

¶18 Further, although we do not rely on the circuit court's assessment of the photo, we observe that in its order denying Boyd's postconviction motion, the circuit court stated that it reviewed the photo of Ivan Jr. and found that "while they look related, the difference in age is striking. Given the length of the victim's

encounter with the defendant as well as her proximity to him, the notion that the victim mistook the almost 33 year old defendant for his 16 year old son is simply incredible." In light of this mistaken identity's lack of credibility, the circuit court concluded that there was no reasonable probability of a different result at trial. We agree.

¶19 Accordingly, we affirm the circuit court as to this evidence.

3. Ivan Jr.'s Letter and Dimitri's Affidavit

¶20 We will assume, without deciding, that Boyd's postconviction motion sets forth sufficient facts, that if true, establish that the remaining newly discovered evidence, which includes Ivan Jr.'s letter and Dimitri's affidavit, was discovered after Boyd's conviction, that Boyd was not negligent in seeking this evidence, that the evidence is material, and that the evidence is not cumulative. We conclude, however, that there is no reasonable probability that a different result would occur on retrial if the jury was presented with the evidence.

¶21 In Ivan Jr.'s letter, Ivan Jr. states: "I'm sorry that you are locked down for some stupid shit I did when I was 16 wilding out. But you kno[w] I will pay you back for every day you sit in there I put that on my lil Brother." We agree with the circuit court that Boyd's letter lacks specificity to establish that Ivan Jr., not Boyd, robbed T.P. with Martin on January 29, 2013, and Ivan Jr.'s statement that "you are locked down for some stupid shit I did" is too vague to be construed as an admission that he committed the offense at issue.

¶22 In Dimitri's affidavit, Dimitri states:

> [D]uring the winter of 2013, possibly in January or February, I witnessed [Boyd] lend his cell phone to his son, Ivan Boyd Jr. This instant [sic] sticks out in my mind

> because when the son returned the cell phone to [Boyd] sometime later, the cell phone had been manually reset and [Boyd] was upset over losing contacts in his cell phone.

¶23 It is not clear from Dimitri's affidavit that Ivan Jr. was in possession of Boyd's cell phone on any day related to the facts of this case. Nothing in Dimitri's affidavit would lead a reasonable jury to reach a different result if presented with that information.

B. Ineffective Assistance of Counsel

¶24 Boyd contends that the circuit court erroneously denied his motion for a new trial based on ineffective assistance of counsel without holding an evidentiary hearing. *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

¶25 To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that counsel's deficient performance was prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove that counsel's performance was deficient, a defendant must point to specific acts or omissions that were "outside the wide range of professionally competent assistance." ***Id.*** at 690. To prove prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different. ***Id.*** at 694. A reasonable probability is a "probability sufficient to undermine confidence in the outcome." ***Id.*** Accordingly, to be entitled to an evidentiary hearing on his claim of ineffective assistance of counsel, Boyd must have alleged facts that, if true, show that Boyd's trial counsel performed deficiently and that Boyd was prejudiced by that deficiency. *See* ***Bentley***, 195 Wis. 2d at 587.

¶26 Boyd alleged in his postconviction motion that his trial counsel was ineffective for the following three reasons: (1) counsel allowed a plea offer to lapse; (2) counsel failed to object to the admissibility of a photo array; and (3) counsel failed to investigate Caroline Criss, Boyd's alibi witness. We address each claim in turn below.

1. Plea Offer

¶27 Boyd contends that his trial counsel performed deficiently by allowing a favorable December 2013 plea offer from the State to lapse even though Boyd wanted to accept the offer. Generally speaking, this argument fails because Boyd's allegations do not include an allegation that Boyd informed his counsel that he wanted to accept the offer while the offer was still pending. Before we address in more detail whether Boyd's motion was sufficient to warrant a hearing on this claim, we set forth additional relevant facts.

¶28 In December 2013, the prosecutor offered Boyd the following plea deal: if Boyd agreed to plead no contest to the reduced charge of theft from a person, the State would agree to amend the information from a charge of armed robbery to a charge of theft from a person, and the State would *recommend* that any sentence imposed by the court be ordered to run concurrently with another sentence Boyd was then serving, "so [Boyd] would not be serving any additional time based on the conviction for this offense." (Emphasis added.) At the hearing on Boyd's plea, the circuit court advised Boyd that the court would not guarantee that any sentence imposed by the court would be imposed concurrent to the sentence he was already serving, that it was possible that the court would order additional jail time, and that the court would give weight to anything T.P. said at sentencing. After this, Boyd stated that he "had nothing to do with the crime" and

his trial counsel, Peter Kovac, informed the court that Boyd "would like to have more time to think about [the plea deal]." The court stated that was "[f]ine," that it would "hold the amended [i]nformation in the file," and that "if [Boyd] still wants to proceed [with the plea], we can do that on the next date." The court scheduled the next hearing date for January 10, 2014.

¶29 The circuit court clerk entries indicate that the January 10, 2014 plea hearing was rescheduled for February 10. Clerk entries indicate that on February 10, Attorney Kovac appeared in court without Boyd who was in custody at the time, and that a final pre-trial conference was scheduled for May 29 and a jury trial was scheduled for June 9. Clerk entries indicate that on May 29, the final pre-trial conference was held off the record. Boyd did not appear at the conference, and the court granted a motion by Attorney Kovac that the June 9 trial be adjourned. The final pre-trial conference was rescheduled for July 2 and Boyd's trial was rescheduled for July 7.

¶30 On June 19, 2014, Boyd filed with the circuit court a pro se motion to "order that the Government be ordered to uphold and honor [the December 5, 2013] plea agreement/contract." Boyd stated in his motion that he had signed the plea agreement and that the signed plea agreement "clearly inferred [his] acceptance" of the State's plea offer. Boyd also stated in his motion that Attorney Kovac "never communicated to [him] that [the prosecutor] issued an ultimatum instructing [Boyd] to either accept [the] plea-agreement or have it 'removed-from-the-table.' In fact, on [February 10, 2014], …. [Attorney Kovac] informed [Boyd] that [the] plea-deal was in fact 'still-on-the-table.'"

¶31 On July 2, 2014, Attorney Kovac asked the court for permission to withdraw as Boyd's trial counsel for personal health reasons, and Attorney

Odalo Ohiku was appointed by the court as Boyd's new trial counsel. A video conference was held on July 14 to introduce Boyd to Attorney Ohiku. At that conference, Boyd asserted that he had found new exculpatory evidence that would exonerate him. Then on June 30, Boyd filed a pro se motion requesting that the circuit court order the State to turn over any exculpatory evidence.

¶32 The circuit court clerk entries indicate that between July 30, 2014 and December 1, a number of status conferences were held and a new judge was assigned to his case. Then, in a letter filed December 17, 2014, Boyd wrote the circuit court that he was being prosecuted for "a crime [he] didn't commit" and he asked that the court order an evidentiary hearing into exculpatory evidence. Thereafter on December 19, the prosecutor issued Boyd a second plea deal, which Boyd ultimately did not accept.

¶33 Turning to Boyd's postconviction motion, Boyd alleged that Attorney Kovac's performance was deficient because Boyd "told [Attorney Kovac] he wished to enter the plea," but Attorney Kovac "failed to secure Boyd's appearance in court" between December 2013 and June 2014, "failed to relay [to the prosecutor] that Boyd intended to [accept the plea] … [and] failed to object to the State revoking [the December 2013] plea offer."

¶34 The record before this court indicates that at the December 2013 hearing, Boyd and his attorney discussed the State's offer, but that Boyd, who maintained his innocence, was not ready to enter a plea at that time. The record indicates that the plea was to be held open until the next hearing, which was scheduled for January 10, 2014, and which was later rescheduled for February 10, 2014. Boyd did not allege in his motion that he conveyed to Attorney Kovac sometime between the December 2013 and the February 10, 2014 hearing that he

wanted to accept the plea, nor is there any evidence in the record indicating that Boyd did.

¶35 Boyd points to four psychologist reports in support of his claim that he wanted to accept the State's offer. In two reports, one for clinical service performed on January 29, 2014 and the other for service performed on February 20, 2014, there is no reference to the State's December 2013 plea offer. In the third report for service performed on February 28, 2014, the psychologist's notes state that Boyd "has decided to accept a plea deal in his pending court case." In the fourth report for service performed on March 27, 2014, the psychologist's notes state that Boyd "shared that he decided to accept a plea deal for his pending case after thinking about all of his options." The first indication in the psychologist reports that Boyd wanted to accept the State's December 2013 offer is contained in the report on clinical service performed on February 28, 2014, which is eighteen days *after* the February 10 hearing. In addition, there is no indication in the report that Boyd conveyed his desire to accept the State's December 2013 plea offer to Attorney Kovac.

¶36 In his reply brief, Boyd also points to an inmate classification report as evidence that he wished to accept the plea prior to the February 10, 2014 hearing. He asserts in the reply brief: "counsel has located an Inmate Classification Report from January 7, 2014, where Boyd told prison staff that he is pleading to the amended charge." The report, which is attached to Boyd's reply brief, further states: "Boyd stated that the pending charges are being reduced to a [t]heft charge." There is no indication in the report, however, that Boyd had informed his trial counsel that he wished to accept the State's plea offer at the February 10 hearing.

¶37 In summary, Boyd has failed to set forth any facts, or to point to any facts in the record, that if true, establish that Attorney Kovac was aware that Boyd wanted to accept the State's offer anytime between December 2013 and February 10, 2014. Instead, the record contains Boyd's repeated rejection of plea agreements and assertions of innocence. Accordingly, we conclude that Boyd's motion was insufficient to establish Boyd's trial counsel was deficient in failing to let the State know that Boyd wished to accept the State's December 2013 plea offer.

2. Photo Array

¶38 Boyd contends that for two reasons Attorney Ohiku was ineffective for failing to challenge at trial the admissibility of an out-of-court photograph array used to identify Boyd.

¶39 First, Boyd alleged in his postconviction motion that Attorney Ohiku was deficient because he failed to object to the admissibility of the array on the ground that the array was not turned over to the defense in a timely manner, as required by WIS. STAT. § 971.23 (2015-16).[1] Section 971.23(1) requires that the

[1] WISCONSIN STAT. § 971.23(1) (2015-16) provides in relevant part:

> (1) WHAT A DISTRICT ATTORNEY MUST DISCLOSE TO A DEFENDANT. Upon demand, the district attorney shall, within a reasonable time before trial, disclose to the defendant or his or her attorney and permit the defendant or his or her attorney to inspect and copy or photograph all of the following materials and information, if it is within the possession, custody or control of the state:
>
> ....
>
> (bm) Evidence obtained in the manner described under s. 968.31(2)(b), if the district attorney intends to use the evidence at trial.

(continued)

State permit a defendant to inspect and copy or photograph certain specified evidence that is in the possession of the State within a "reasonable time before trial." The State presented the defense with the photo of Boyd that was used in the array prior to trial, but did not give the defense an opportunity to inspect the other pictures in the photo array until the first day of trial. Boyd alleged in his postconviction motion that this was not within a "reasonable time," and that Attorney Ohiku was deficient in failing to object to the array's admission at trial on that basis because the State's failure to permit earlier inspection of the array "effectively crippled [his] defense," "denied [Attorney Ohiku] the ability to effectively cross-examine … [T.P] and Officer Charles Leach," and Attorney Ohiku "could not effectively test the reliability of identification evidence in the presence of the jury."

¶40 Non-conclusory allegations should present the "who, what, where, when, why, and how" with sufficient particularity to assess the claim. ***Allen***, 274 Wis. 2d 568, ¶23. Here, Boyd's motion failed to set forth how or why his defense was "crippled," how or why Attorney Ohiku's ability to cross-examine witnesses was "denied" or who those witnesses were, or why Attorney Ohiku was not able to "effectively test the reliability of identification evidence" during trial. Boyd's conclusory assertions were insufficient to show that his trial counsel was deficient.

> ....
>
> (e) Any relevant written or recorded statements of a witness named on a list ... and the results of any ... comparison that the district attorney intends to offer in evidence at trial.
>
> ....
>
> (g) Any physical evidence that the district attorney intends to offer in evidence at the trial.

¶41 Second, Boyd alleged that Attorney Ohiku was deficient because he failed to object to the admissibility of the array on the ground that the array is impermissibly suggestive. Identification evidence will be suppressed if the evidence stems from a procedure that is "'so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.'" ***State v. Benton***, 2001 WI App 81, ¶5, 243 Wis. 2d 54, 625 N.W.2d 923 (quoted source omitted). The burden lies with the defendant to show that a photographic array challenged as impermissibly suggestive is impermissibly suggestive. ***State v. Mosley***, 102 Wis. 2d 636, 652, 307 N.W.2d 200 (1981).

¶42 Boyd asserted that the array is "impermissible suggestive" because in Boyd's photograph, there is "a white substance on the right side of his face … [and] his eyes appear to be swollen shut," and "the other photos [in the array] do not depict similar issues." Pictures in a photographic array "need not be identical." ***Powell v. State***, 86 Wis. 2d 51, 67, 271 N.W.2d 610 (1978). Isolated differences in the appearance of the defendant and others in an array or lineup, such as differences in height and weight, do not make the identification procedure impermissibly suggestive. *See* ***Benton***, 243 Wis. 2d 54, ¶10. Boyd did not explain in his motion how or why the differences are unduly suggestive of the individual who robbed T.P. so as to give rise to a substantial likelihood that T.P. would misidentify Boyd as the offender. Furthermore, the features identified by Boyd would have been visible to the defense prior to trial when Boyd's picture was turned over. If they were unusual enough to draw attention to that photo, the defense would not have needed the remaining photos to conclude that the picture was impermissibly suggestive. Accordingly, we conclude that Boyd's allegation that Attorney Ohiku was ineffective for not challenging the photo array as

impermissibly suggestive is conclusory and was insufficient on its face to entitle Boyd to an evidentiary hearing.

C. Investigation into Alibi Witness

¶43 Boyd contends that his "trial counsel" was ineffective for failing to investigate his alibi, Caroline Criss. Boyd asserted in his postconviction motion that in a sworn affidavit, Caroline averred that she was with Boyd on January 29, 2013. Boyd further asserted that his "[t]rial [c]ounsel was aware of the alibi defense, but did not investigate such claims" and that "[t]hese errors prejudiced Boyd by preventing him from having an alibi defense." Boyd's motion failed to set forth who communicated the alibi information to Boyd's counsel, when that information was communicated, how the information was communicated, or what information was communicated. Boyd's allegations did not provide sufficient detail to establish that counsel was aware of the alibi claim. Accordingly, we agree with the circuit court that Boyd's allegations did not set forth sufficient material facts to require an evidentiary hearing.

¶44 Because Boyd failed to set forth sufficient facts in his postconviction motion showing that Attorneys Kovac and Ohiku were ineffective, we conclude that the circuit court did not err in denying his postconviction motion regarding that issue without a hearing.

CONCLUSION

¶45 For the reasons discussed above, we affirm.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16).